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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JANET RAMIREZ,

Defendant and Appellant.

B278015

(Los Angeles County
Super. Ct. No. BA428990)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed in part, and reversed in part.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Janet Ramirez appeals from her judgment of conviction of second degree murder (Pen. Code, § 187, subd. (a)) with a true finding on the enhancement allegation that she personally used a firearm in the commission of the offense (Pen. Code, § 12022.53, subd. (b).) On appeal, Ramirez contends: (1) the prosecutor committed prejudicial misconduct by misstating the law during closing argument; (2) the evidence was insufficient to support the conviction for second degree murder; and (3) the trial court erred in instructing the jury on the elements of the personal-use-of-a-firearm enhancement. We conclude that the jury's true finding on the firearm enhancement allegation must be reversed based on instructional error, but otherwise affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In a one-count information, the Los Angeles County District Attorney charged Ramirez with the murder of Irvin Steven Garcia (Pen. Code,¹ § 187, subd. (a)). It also was alleged that, in the commission of the offense, Ramirez personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing death or great bodily injury (§ 12022.53, subd. (d)). Ramirez pleaded not guilty and denied the enhancement allegations.

II. The Evidence At Trial

A. Events Preceding Garcia's Death

Ramirez and Garcia were in a long-term relationship and lived together in an apartment in Los Angeles with their two

¹ All further statutory references are to the Penal Code.

young daughters. Garcia worked as a private armed security guard; as part of his employment, he had been issued a revolver, along with a storage case and a lock for his weapon. Garcia had been trained to keep his firearm unloaded, locked, and secured inside the storage case when he was outside of work.

On August 26, 2014, about a week before Garcia's death, Ramirez sent a series of text messages to her brother about problems she was having in her relationship with Garcia. In one message, Ramirez told her brother that Garcia "kept saying he's not happy and sometimes neither am I. It just makes me feel like we're just wasting our time being together if neither one of us is happy. . . ." The next day, Ramirez texted her brother that she had broken up with Garcia, stating: "That's it. I have no fight left in me. We broke up. I mean, how can I keep trying if he doesn't care and keeps pushing me away? Honestly, it's exhausting being with him. I'm done trying." Ramirez also related that she had been upset about Garcia spending time with a woman named Monica, and that when she raised the issue with him, Garcia simply made light of the situation. Ramirez explained: "Even if nothing happened, I don't know that. And the shit he says doesn't help."

During this time period, Ramirez also exchanged a series of text messages with her close friend, Yesenia Cruz, about her relationship problems. On August 26, 2014, Ramirez texted Cruz: "Relationships do have their ups and downs and that's exactly how I feel. Sometimes I feel, like, happy and sometimes I can't stand the [sight] of him, lol, but we talked about it. We'll see if he gets it this time. What pisses me off is that he acts all psycho with me but yet, he feels it's okay for him to still have girlfriends, be alone with them and I don't think it's appropriate."

The following day, Ramirez texted Cruz about her break up with Garcia. In one message, Ramirez stated: “I feel like I love him so much and I could never leave him and sometimes he acts stupid and he changes, so [I don’t know]. I guess we’ll see what happens. I’m not moving out or anything. I can’t afford it. I have to save [money]. We’ll see what happens in the meantime.” Ramirez later told Cruz that she and Garcia had reconciled.

B. Shooting Death of Garcia

On the evening of September 1, 2014, Ramirez and Garcia had a gathering at their home for a group of friends. The group consisted of Oswald Cuyun, Rigo Gutierrez, George Rivera, and Monica Herrera. During the gathering, Ramirez, Garcia, and their friends watched a sporting event on television and ate food prepared by Ramirez. They also played a drinking game during which Garcia consumed three to five beers. Ramirez and Garcia appeared to get along well throughout the gathering. They laughed and smiled at one another, and did not argue.

Later that night, Garcia walked outside with the group of friends while Ramirez stayed in the apartment with the couple’s children. After dropping off Herrera at her nearby home, Garcia, Cuyun, Gutierrez, and Rivera walked to a local bar where they drank some additional beers. The men then went to a second bar where they played pool and continued drinking. Garcia had five to six beers. At about 2:00 a.m., Garcia’s friends dropped him off in front of his apartment complex.

While Garcia was out drinking with his friends, Ramirez repeatedly tried to reach him on his cell phone. She made eight unanswered calls to Garcia during that time. At 12:45 a.m., Ramirez sent a text message to Garcia asking why it was taking him so long to return home. A few minutes later, Ramirez called

Herrera and asked her if she knew where Garcia was. Herrera said that she did not know and ended the call. Ramirez made five additional calls to Herrera that night, which Herrera did not answer. At 1:19 a.m. Ramirez sent a text message to Herrera, asking: "Is Steven with you?" Herrera did not respond to Ramirez's text.

At 1:21 a.m., Ramirez sent a text message to Cruz, stating: "I'm going to fucking kill Steven, dude. I knew I wasn't crazy. I know he's fucking that bitch next door. She came earlier with some guys she works with and he went too. . . . It's been an hour and he's still not back. I went outside to look for him because the girls are asleep and no one's out there and his car is still there. I'm sorry, dude. I know it's late, but I'm fucking going crazy. I want to kill him. I call[ed] her earlier and she was, like, 'Oh, I don't know.' I came home and then I called again and now all of a sudden her phone is off. And his has been off. Ah, dude. I'm shaking at how mad I am." After receiving this text, Cruz called Ramirez. She told Ramirez to calm down, and suggested that Garcia might be outside talking with his friends. During the call, Ramirez was crying and upset, but Cruz did not believe she was angry. At 2:00 a.m., Cruz sent a text message to Ramirez asking for Garcia's phone number so that she could call him directly and see if he answered. A minute later, Ramirez texted Cruz: "He's coming in. I'll [talk to you later]."

At 2:03 a.m., Ramirez called 911.² She was screaming and crying as she told the 911 operator that Garcia had shot himself in the head in front of her. She also said that she thought Garcia

² An audio recording of the 911 call was played at trial, and a transcript of the call was provided to the jury.

was dead. After advising Ramirez that the paramedics were on the way, the operator instructed her on how to provide care for Garcia. The operator began by asking where Garcia was. Ramirez responded that he was lying on their bed, and that she was trying to turn him around. The operator directed Ramirez to lay Garcia flat on his back with his face up. Ramirez then exclaimed that Garcia was breathing and had shot himself in the eye. The operator instructed Ramirez to get a dry cloth and apply pressure to the area. He also told Ramirez to roll Garcia on his side if he was trying to spit out blood. Later, when it appeared that Garcia had stopped breathing, the operator directed Ramirez to begin CPR. As Ramirez performed CPR on Garcia, she repeatedly asked the operator where the paramedics were and why it was taking so long. At one point, Ramirez exclaimed: "Oh my God? Steven, [w]hat the hell did you do?" She also pleaded with the operator: "Please, where are they? Please! I don't want him to die. Please, [p]lease, he's still breathing, we can still save him, [p]lease."

At approximately 2:10 a.m., the police and paramedics arrived on the scene. Upon approaching the apartment, Los Angeles Police Officers David Gallardo and Jose Camacho saw Ramirez standing at the front door covered in blood. She was screaming that Garcia was alive and needed help, and directed the officers to the couple's bedroom. When the officers entered the bedroom, they saw Garcia lying on his back near the edge of the bed with his feet off the ground. He had a gunshot wound to the right side of his face, and was conscious but struggling to breathe. There was a revolver on the bed near Garcia's head, about 12 to 18 inches away. Officer Gallardo, who knew the radio call had reported an attempted suicide, thought it was unusual

that the gun would have landed right next to Garcia's head if he had fired it himself.

While the paramedics tended to Garcia, Officer Gallardo took the revolver to the dining room area. As Officer Gallardo was securing the revolver by removing the five unspent cartridges, he observed brain matter inside the cylinder of the gun. He also noticed a gun case on the kitchen counter. The paramedics transported Garcia to the hospital, where he was pronounced dead at 2:42 a.m.

C. Ramirez's Statements to the Police

Los Angeles Police Officer Eric Horn responded to the scene shortly after Officers Gallardo and Camacho. Upon entering the apartment, he saw that Ramirez was crying hysterically and appeared to be in shock. After escorting Ramirez to the kitchen area, Officer Horn asked her what happened. Ramirez initially responded that Garcia shot himself after an argument. When Officer Horn again asked her about the shooting, Ramirez stated that she and Garcia had an argument, that he went to get a gun, and that he said he was going to kill himself. Ramirez further stated that, when Garcia put the gun to his head, she grabbed at it to prevent him from shooting himself, and the gun "just went off." In response to Officer Horn's question about their relationship, Ramirez said that Garcia was a good person, and that their daughters loved him. She also told Officer Horn that Garcia was having an affair with someone who lived nearby.

After the paramedics took Garcia to the hospital, Officer Camacho directed Ramirez to clean up in case she needed to tend to her daughters, who were asleep in their bedroom. He then spoke with Ramirez in the living room and asked her what happened. Ramirez recounted that she and Garcia had a party

earlier that evening, and that Garcia walked out with the last guest around midnight. When Garcia returned home around 2:00 a.m., they argued about infidelity issues. Ramirez then placed a gun case on the bed. In response, Garcia said to her, “What are you going to do, shoot me now?” Garcia took the gun out of the case, waved it around, and yelled that he was not afraid of guns. At that moment, the gun went off, striking Garcia in the face and causing him to fall onto the bed. Ramirez told Officer Camacho that she moved the gun case to the kitchen after the shooting, but she did not give a reason for doing so.

About 30 minutes after Ramirez made this statement, Officer Camacho had a second conversation with her about the shooting. At that time, Ramirez gave a different version of events. Ramirez told Officer Camacho that, when Garcia grabbed the gun, she attempted to take it away from him. Garcia and Ramirez then struggled over the gun, and during the struggle, the gun went off. Officer Camacho observed that Ramirez was calm while making this second statement.

D. Forensic Evidence

Los Angeles Deputy Medical Examiner Jeffrey Gustadt supervised the autopsy of Garcia. He testified that Garcia died of a single gunshot wound to the head. The bullet entered the right eye area and traveled from front to back at a slightly downward angle. There was soot deposited around the entry wound, which indicated that the gun was fired from a distance of one-half inch or less. However, the absence of a muzzle abrasion indicated that the gun was not pressed against the skin when it was fired. Garcia was six feet tall and weighed 263 pounds. He had a blood alcohol content of 0.23 to 0.25 percent, and likely was intoxicated at the time of death. Gustadt opined that Garcia’s death was the

result of a homicide based on the autopsy findings and the police report of the investigation. He conceded, however, that Garcia's gunshot wound could have been inflicted accidentally during a struggle over the firearm.

Carole Acosta, a criminalist in the Los Angeles Police Department, conducted a firearm examination of the gun that was used in the shooting. The gun was a .38 caliber Smith and Wesson revolver with both a single action and a double action mode. Single action mode required the shooter to manually cock the hammer and then pull the trigger to fire. Double action mode allowed the shooter to fire by pulling the trigger without having to first manually cock the hammer. In single action mode, the revolver required four pounds of pressure to fire; in double action mode, it required 13 and a half pounds of pressure. The revolver was functional and had internal safety features designed to prevent an accidental discharge. Acosta acknowledged, however, that it was possible for the trigger to be pulled accidentally if enough pressure was applied. Dried blood was found throughout the surface of the revolver, including the barrel and grip. No blood was detected on the gun case, and no fingerprints were recovered from the gun.

III. Verdict and Sentencing

At the conclusion of the trial, the jury found Ramirez guilty of second degree murder. The jury also found the allegation that Ramirez personally used a firearm in the commission of the offense (§ 12022.53, subd. (b)) to be true, but found the allegations that she personally and intentionally discharged a firearm (§ 12022.53, subds. (c), (d)) to be not true. Ramirez was sentenced to state prison for a total term of 25 years to life: 15 years to life for the second-degree murder conviction, plus

an additional 10-years for the personal-use-of-a-firearm enhancement. Ramirez timely appealed.

DISCUSSION

I. Prosecutorial Misconduct in Misstating the Law

Ramirez asserts that the prosecutor committed prejudicial misconduct during closing argument. She specifically argues that the prosecutor misstated the standard of proof beyond a reasonable doubt when he told the jury at the end of his rebuttal argument that guilt is shown if the People's theory is reasonable. The Attorney General contends that Ramirez has forfeited this claim by failing to object and to request an admonition at trial, and that even if the claim has been preserved, it lacks merit.

A. Relevant Proceedings

Prior to closing argument, the trial court instructed the jury on the applicable law. Among other instructions, the court gave CALCRIM No. 220 on the burden of proof: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. . . . Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, she is entitled to an acquittal and you must find her not guilty."

The court also gave CALCRIM No. 224 on circumstantial evidence: “Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.”

In his closing argument, the prosecutor began by explaining the People’s theory of the case. He stated: At about 2:00 a.m., as Garcia was sitting on the bed, Ramirez “comes to him with a firearm, with a revolver, creating that downward trajectory and one shot point blank and executes him less than one-and-a-half inches to his head. He falls back on the bed. That’s the People’s theory. It’s reasonable and it’s consistent [with] the facts.” After outlining some of the facts supporting this theory, the prosecutor described the burden of proof as follows: “Here’s what reasonable doubt is. Remember, it’s not beyond all shadow of a doubt. It’s not beyond all possible doubt. It’s beyond a reasonable doubt. It is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt. It’s what makes sense. It’s that lasting belief that you have, ladies and gentlemen. It’s a

lasting belief that you did the right thing when you step out those doors and what makes sense, consistent with the evidence. Using your ability to reason[,] using logic, using your common sense.” The prosecutor then argued to the jury in more detail why the People’s theory that Ramirez was guilty of murder was reasonable and consistent with the evidence. He also urged the jury to reject all possible defense theories, such as an accident or manslaughter, because they were not consistent with the evidence, and defied reason and common sense.

In his closing argument, defense counsel focused on the standard of proof. He argued that the People had not proven their case beyond a reasonable doubt because there was no direct evidence that Ramirez acted with express or implied malice, and the circumstantial evidence offered by the prosecutor to prove murder supported a reasonable conclusion that the shooting was either an accident or involuntary manslaughter. In making this argument, defense counsel told the jury to keep in mind the following: “You have circumstantial evidence in this case and that’s basically what this case is about, circumstantial evidence. And if there’s another reasonable conclusion as to some of these arguments the prosecutor’s making from the circumstantial evidence and one of those versions is reasonable that points to innocence, then you have to accept the one that points to innocence. The key phrase is they have to be reasonable, but if there’s two reasonable explanations, one pointing to guilt, one pointing to innocent, you have to accept the one that points to innocence. That’s what the law tells us.”

In his rebuttal, the prosecutor stated his agreement with defense counsel that “this process is all about . . . whether or not the People prove their case beyond a reasonable doubt.” With

respect to the reasonable doubt standard, the prosecutor then told the jury: “And we talked about reasonable doubt, ladies and gentlemen. I just want you to understand that, once again, is it making sense? . . . It was asked, how do you know if your child is telling the truth? . . . One of you said, well, if one looks you straight in the eye, telling the truth. The other one looks at you not in the eye, telling a lie. There’s something else that a parent uses. If a person changes their story, their child changes their story, doesn’t that indicate also a lie? It does. The People aren’t asking you to engage in mental gymnastics. We’re just asking you to use the simple theory, a reasonable theory, the science.”

The prosecutor concluded his rebuttal with the following statement: “And when we talk about that jury instruction circumstantial evidence, if the People’s theory is reasonable, it’s really straight forward based upon the evidence. If the defense theory is reasonable, the tie goes to the defendant. Understand—understandable, but if the People’s theory is reasonable and the defense theory is unreasonable, find defendant guilty. That’s what the instruction is. Here’s the thing with regards to the defense theory, ladies and gentlemen. They have three—at least three different theories, but there is only one truth. There is only one truth and it never changes and that’s why when you disregard the defense theories you’re left with the one reasonable theory, that she’s guilty of murder. Thank you so much, ladies and gentlemen.” Defense counsel did not object to the prosecutor’s argument or request any type of admonition from the trial court.

B. Governing Legal Principles

““A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.” [Citation.]” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332.) Where, as here, “a claim of misconduct is based on the prosecutor’s comments before the jury, . . . “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” [Citation.]” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.) “A defendant’s conviction will not be reversed for prosecutorial misconduct’ that violates state law . . . ‘unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.’ [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071.)

““To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument.” [Citation.] A court will excuse a defendant’s failure to object only if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. [Citation.]” (*People v. Jackson* (2016) 1 Cal.5th 269, 349.) “Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if [she] believes the prosecutor has overstepped

the bounds of proper comment, argument, or inquiry.’ [Citation.]” (*People v. Gray* (2005) 37 Cal.4th 168, 215.)

C. The Prosecutor Committed Misconduct in His Closing Argument to the Jury By Misstating the Law on the Standard of Proof

In contending that the prosecutor committed misconduct, Ramirez specifically challenges the prosecutor’s statement at the conclusion of his rebuttal argument that “if the People’s theory is reasonable and the defense theory is unreasonable, find [the] defendant guilty.” Ramirez argues that the prosecutor misstated the law on the standard of proof by incorrectly telling the jury that it could find her guilty of murder so long as the People’s theory of the case was reasonable. Ramirez also asserts that the error was prejudicial because the prosecutor’s statement had the effect of lowering the burden of proof and was the last word that the jury heard on the subject.

As the California Supreme Court explained in *People v. Centeno* (2014) 60 Cal.4th 659 (*Centeno*): “Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, ‘it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].’ [Citations.] To establish such error, bad faith on the prosecutor’s part is not required. [Citation.] “[T]he term prosecutorial “misconduct” is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.’ [Citation.]” (*Id.* at pp. 666-667; accord, *People v. Cortez* (2016) 63 Cal.4th 101, 130.)

In *Centeno*, the Supreme Court held that the prosecutor misstated the burden of proof during closing argument, in part, by urging the jury to find the defendant guilty based on a reasonable view of the evidence. (*Centeno, supra*, 60 Cal.4th at pp. 671-673.) The defendant was tried on charges of child sexual abuse. In closing argument, his counsel focused on the reasonable doubt standard, and argued that the prosecution’s “whole case was one of missing evidence, missing links, and missing pieces that give rise to reasonable doubt.” (*Id.* at p. 664.) In her rebuttal, the prosecutor also focused on the reasonable doubt standard. Displaying a diagram showing the geographical outline of the state of California, she asked the jury to consider a hypothetical trial in which the issue was the identity of the state, and argued that, even if there were inconsistencies, omissions, or errors in the evidence presented, the jury would have no reasonable doubt that the state was California. (*Id.* at p. 665.) The prosecutor explained: “What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities. There is the impossible, which you must reject, the [possible] but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle. It has to be based on reason. It has to be a reasonable account. . . . [Y]ou need to look at the entire picture, not one piece of evidence, not one witness . . . to determine if the case has been proven beyond a reasonable doubt.” (*Id.* at p. 665-666.)

Turning to the facts of the case, the prosecutor then argued to the jury: “Is it reasonable to believe that a shy, scared child who can’t even name the body parts made up an embarrassing, humiliating sexual abuse, came and testified to this in a room full of strangers or the defendant abused Jane Doe. That is what is

reasonable, that he abused her. [¶] Is it reasonable to believe that Jane Doe is lying to set-up the defendant for no reason or is the defendant guilty? . . . Is it reasonable to believe that there is an innocent explanation for a grown man lying on a seven-year old? No, that is not reasonable. . . . Is it reasonable to believe that the defendant is being set-up in what is really a very unsophisticated conspiracy led by an officer who has never met the defendant or he[s] good for it? That is what is reasonable. He's good for it.” (*Centeno, supra*, 60 Cal.4th at p. 666.)

In addition to concluding that the prosecutor's diagram of California and related hypothetical were improper, the *Centeno* court considered whether the prosecutor's argument about a reasonable theory of the evidence misled the jury about the standard of proof. (*Centeno, supra*, 60 Cal.4th at pp. 671-673.) The court began by noting that “many parts of the prosecutor's argument were unobjectionable.” (*Id.* at p. 672.) For instance, “[i]t is permissible to argue that the jury may reject impossible or unreasonable interpretations of the evidence and to so characterize a defense theory. [Citation.] It is permissible to urge that a jury may be convinced beyond a reasonable doubt even in the face of conflicting, incomplete, or partially inaccurate accounts. [Citation.] It is certainly proper to urge that the jury consider all the evidence before it. [Citation.]” (*Ibid.*) The prosecutor thus did not err in arguing that the jury could consider reasonably possible interpretations to be drawn from the evidence. (*Ibid.*)

The prosecutor did err, however, when she “strongly implied that the People's burden was met if its theory was ‘reasonable’” in light of the evidence. (*Centeno, supra*, 60 Cal.4th at p. 671.) This is because “it is error for the prosecutor to

suggest that a ‘reasonable’ account of the evidence *satisfies the prosecutor’s burden of proof.*” (*Id.* at p. 672.) As the *Centeno* court observed: “It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt.” (*Ibid.*) Moreover, “[i]t is, and remains, the prosecutor’s burden to prove the case. If the defense chooses to produce evidence, the jury must, of course, consider it as part of the complete record before it. To that end, the prosecution can surely point out that interpretations proffered by the defense are neither reasonable nor credible. Nevertheless, even if the jury rejects the defense evidence as unreasonable or unbelievable, that conclusion does not relieve or mitigate the prosecutorial burden.” (*Id.* at p. 673.)

The *Centeno* court concluded that “the prosecutor did not simply urge the jury to “accept the reasonable and reject the unreasonable” in evaluating the evidence before it. [Citation.] Rather, she confounded the concept of rejecting unreasonable inference with the standard of proof beyond a reasonable doubt. She repeatedly suggested that the jury could *find defendant guilty* based on a ‘reasonable’ account of the evidence. These remarks clearly diluted the People’s burden.” (*Centeno, supra*, 60 Cal.4th at p. 673.) The court also concluded it was reasonably likely that the prosecutor’s argument, along her improper visual aid, “misled the jury about the applicable standard of proof and how the jury should approach its task.” (*Id.* at p. 674.) The prosecutor’s statements, in particular, “left the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden.” (*Id.* at p. 672.)

In this case, the prosecutor’s argument at the conclusion of his rebuttal was substantially similar to the prosecutor’s

improper remarks in *Centeno* about a reasonable account of the evidence. The prosecutor told the jury that it could find Ramirez guilty “if the People’s theory is reasonable and the defense theory is unreasonable.” He also told the jury that it must reject the different theories offered by the defense because “there is only one truth,” and “that’s why when you disregard the defense theories you’re left with one reasonable theory, that she’s guilty of murder.” As in *Centeno*, the prosecutor “did not simply urge the jury to “accept the reasonable and reject the unreasonable” in evaluating the evidence before it.” (*Centeno, supra*, 60 Cal.4th at p. 673.) Rather, the prosecutor erroneously conflated the standard for evaluating circumstantial evidence with the standard of proof beyond a reasonable doubt.

Before a jury may rely on circumstantial evidence to find the defendant guilty, it must be convinced that (1) the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty; and (2) the People have proved each fact essential to that conclusion beyond a reasonable doubt. (CALCRIM No. 224; see also *People v. Livingston* (2015) 53 Cal.4th 1145, 1165-1166 [approving CALCRIM instructions on circumstantial evidence.]) It is not sufficient that the jury simply believe the People’s theory is reasonable and the defense theory is unreasonable. Nor is it sufficient that the jury reject each of the alternative theories offered by the defense. Rather, the jury must be convinced that the People’s theory of guilt is the only reasonable conclusion supported by the evidence, *and* that all facts essential to that conclusion have been proven beyond a reasonable doubt. Here, the prosecutor’s statements at the end of his rebuttal left the jury with the impression that the People’s burden was satisfied so long as its theory was reasonable and the

defense theory was unreasonable. The prosecutor's concluding remarks also suggested that, once the jury rejected the different defense theories, it had to accept the People's theory because "there is only one truth." The effect of these statements was to lessen the People's burden of proof by equating a reasonable theory of guilt with proof of guilt beyond a reasonable doubt. This was error under *Centeno*.

D. Ramirez Forfeited Her Prosecutorial Misconduct Claim by Failing to Object

Although the prosecutor's argument to the jury at the close of his rebuttal was improper, it is undisputed that Ramirez never objected to any of the statements about which she now complains, nor did she seek a curative admonition from the trial court. As the Supreme Court explained in *Centeno*, a defendant generally "may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety." [Citation.] (*Centeno, supra*, 60 Cal.4th at p. 674.) While the failure to object may be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct, "[a] prosecutor's misstatements of law are generally curable by an admonition from the court." (*Ibid.*) In this case, there is nothing in the record to suggest that an objection to the prosecutor's misstatement about the standard of proof would have been futile, or that a prompt admonition by the trial court would not have cured the harm. Ramirez therefore has forfeited her claim of prosecutorial misconduct on appeal.

E. Ramirez’s Ineffective Assistance Claim Is More Appropriately Resolved in a Habeas Proceeding

Recognizing the likely forfeiture of her claim of misconduct, Ramirez alternatively argues that her trial counsel rendered ineffective assistance by failing to object to the prosecutor’s misstatement of the law and to request a curative admonition. To prevail on a claim of ineffective assistance of counsel, “the defendant must first show counsel’s performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009; see *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

On appeal, we “defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” [Citation.] . . . “Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.” [Citation.]’ [Citation.] If the record on appeal ““sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,’ the claim on appeal must be rejected,” and the ‘claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.’ [Citation.]” (*People v. Vines* (2011) 51 Cal.4th 830, 876, overruled in part on other grounds in *People v. Hardy* (2018) 5 Cal.5th 56, 104.)

In *Centeno*, the Supreme Court concluded that the defense counsel's failure to object to the prosecutor's misstatement of law about the standard of proof constituted ineffective assistance. With respect to the deficient performance prong, the *Centeno* court stated: "[T]he problems with the prosecutor's argument were not difficult to discern. [A prior appellate case], which disapproved use of a puzzle showing the Statue of Liberty to 'illustrate' the reasonable doubt standard, provided firm grounds for an objection at the time of defendant's trial. Additionally, counsel required no authority beyond section 1096 [defining the reasonable doubt standard] to conclude that the prosecutor's argument urging the jury to convict based on a reasonable account of the evidence misstated the burden of proof." (*Centeno, supra*, 60 Cal.4th at p. 675.) The *Centeno* court also noted that, because the prosecutor's misstatement came in rebuttal, defense counsel's "only hope of correcting the misimpression was through a timely objection and admonition from the court." (*Ibid.*) Given these circumstances, the court could "conceive of no reasonable tactical purpose for defense counsel's omission." (*Ibid.*)

In this case, however, the record does not affirmatively disclose that Ramirez's trial counsel had no rational tactical purpose in declining to object to the prosecutor's improper argument. On the issue of deficient performance, *Centeno* is therefore distinguishable. While the prosecutor in *Centeno* repeatedly suggested that the jury could find the defendant guilty based on a reasonable account of the evidence, the prosecutor here made a single misstatement about the standard of proof when he told the jury that "if the People's theory is reasonable and the defense theory is unreasonable, find defendant guilty." Moreover, unlike the prosecutor in *Centeno*, the prosecutor in this

case did not use an improper visual aid that further mischaracterized the burden of proving guilt beyond a reasonable doubt. As the *Centeno* court observed, a prosecutor's act of "[e]xplaining' the reasonable doubt standard by using an iconic image unrelated to the evidence is particularly misleading to the jury and strikes at the most fundamental issue in a criminal case." (*Centeno, supra*, 60 Cal.4th at p. 675.) The failure to object to the prosecutor's argument in such circumstances lacks any reasonable tactical purpose. (*Ibid.*)

We do not suggest that the record on appeal shows that Ramirez's trial counsel had a tactical reason for his omission. We also reach no conclusion about whether trial counsel's alleged deficient performance resulted in prejudice to Ramirez. Rather, we simply conclude that the record before us does not reveal why trial counsel failed to object to the prosecutor's misstatement of the law, and that Ramirez has not established on direct appeal that there could be no satisfactory explanation for that omission. Accordingly, Ramirez's claim of ineffective assistance of counsel is more appropriately resolved by way of a petition for writ of habeas corpus.

II. Sufficiency of Evidence on the Murder Conviction

Ramirez also challenges the sufficiency of the evidence supporting her conviction for second degree murder. She claims that the evidence was insufficient to establish that she acted with either express or implied malice, thus requiring that her murder conviction be reversed or reduced to manslaughter.

A. Governing Legal Principles

In considering a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any*

rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict. [Citation.]’ (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; see also *People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

Murder is the unlawful killing of a human being “with malice aforethought.” (§ 187, subd. (a).) “Malice may be either express or implied. [Citation.] Express malice is an intent to kill. . . . Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person knowingly acts with conscious disregard for the danger to life that the act poses. [Citation.]” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) “A killing with

express malice formed willfully, deliberately, and with premeditation constitutes first degree murder. [Citation.] ‘Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.’ [Citation.]” (*People v. Beltran* (2013) 56 Cal.4th 935, 942.)

B. Ramirez’s Second Degree Murder Conviction Was Supported by Substantial Evidence

Viewing the evidence in the light most favorable to the jury’s verdict, we conclude that the evidence was sufficient to support Ramirez’s conviction for second degree murder. The prosecutor presented evidence that, a week before the shooting, Ramirez and Garcia were having relationship problems, in part, because Ramirez suspected that Garcia was having an affair. On the night of the shooting, at 1:21 a.m., Ramirez texted her friend, Cruz, that she was “shaking” with anger, and that she was “going to fucking kill” Garcia because “he’s fucking that bitch.” At 2:01 a.m., Ramirez texted Cruz that Garcia was “coming in”; less than three minutes later, Garcia had been shot. Such evidence could support a reasonable inference by the jury that Ramirez was so enraged at Garcia at the time of the shooting that she harbored an intent to kill.

The prosecutor also presented evidence that the gun used in the shooting was fired less than one-half inch from Garcia’s head, striking him in the face. The bullet traveled at a slightly downward angle, which could support an inference that Garcia was in a sitting position when the shot was fired. The prosecutor presented further evidence that the gun was found on the bed close to Garcia’s head, and that the gun case was found in the

kitchen far from where Garcia was shot. Given that Garcia was shot less than three minutes after he walked into the apartment, the jury reasonably could have inferred that Garcia did not have sufficient time to retrieve the gun from the kitchen, take it to the bedroom, and then shoot himself in the face following an argument with Ramirez.

Additionally, the prosecutor offered evidence that Ramirez made inconsistent statements to the police about how the shooting occurred. She told Officer Horn that Garcia retrieved the gun during an argument and threatened to kill himself; when Ramirez grabbed at the gun to prevent Garcia from shooting himself in the head, it “just went off.” Ramirez told Officer Camacho that Garcia took the gun out of its case during an argument, and that it accidentally went off as he was waving it around and yelling that he was not afraid of guns. However, a short time later, Ramirez later told Officer Camacho that she and Garcia struggled over the gun after he retrieved it, and that the gun accidentally discharged during the struggle. It is true, as Ramirez asserts, that some of the variations in her accounts of the shooting were relatively minor and could reflect that she was simply providing more detail in response to further questioning. On the other hand, some aspects of her statements were clearly inconsistent with one another, and reasonably could support an inference that Ramirez changed her story to hide the truth of how the shooting occurred and what role she occupied in it.

Ramirez nevertheless contends that the testimony of the officers who described her accounts of the shooting was far more inconsistent and lacking in credibility than her own statements to those officers about what occurred. She notes that the officers did not take notes during their conversations with her, and that

by their own admission, they spoke with her at a time when she was hysterical, crying, and repeatedly asking for help for Garcia. Ramirez also notes that Officer Camacho's trial testimony about her statements conflicted with his preliminary hearing testimony in several respects, thus undermining his credibility. However, evidence of these alleged deficiencies in the officers' testimony was presented to the jury. Defense counsel had a full opportunity to cross-examine Officers Horn and Camacho about their written reports and independent recollections of Ramirez's statements to them, and to expose any inconsistencies or other weaknesses in the officers' testimony about those statements. It is well-established that "[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Elliott* (2012) 53 Cal.4th 535, 585; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 996 ["[e]xcept in . . . rare instances of demonstrable falsity, doubts about the credibility of [an] in-court witness should be left for the jury's resolution"].)

Ramirez also argues that the jury's findings on the firearm enhancement allegations cannot be reconciled with a conclusion that she acted with either express or implied malice, as required to convict her for murder. In finding Ramirez guilty of second degree murder, the jury found the allegation that she personally used a firearm in the commission of the offense to be true, but found the allegations that she personally and intentionally discharged a firearm to be not true. Ramirez asserts that, based on these findings, the jury must have concluded that she did not personally discharge the gun, or that if she did discharge it, such

act was unintentional. Even assuming that the jury's findings on the firearm enhancement allegations are inconsistent with a finding of express malice, the jury still reasonably could have concluded that Ramirez acted with implied malice in the shooting death of Garcia, and was therefore guilty of murder.

As previously discussed, in one of her statements to the police, Ramirez recounted that she and Garcia struggled over the gun during an argument about his suspected infidelity, and that the gun discharged accidentally in the course of that struggle. While Ramirez never admitted to retrieving the gun from its case or brandishing it during her argument with Garcia, the jury reasonably could have inferred from the other evidence presented that Ramirez took the gun from the case before Garcia came home and then used it to threaten him when he walked into the bedroom. The jury also reasonably could have concluded that, by brandishing the gun during the argument with Garcia, Ramirez intentionally committed an act that was dangerous to human life and did so in conscious disregard for the danger to life that her act posed. Accordingly, even if the jury believed that the gun was fired accidentally as Ramirez and Garcia struggled for possession of it, the jury still could have concluded that Ramirez was guilty of murder based on a finding of implied malice. (See *People v. Thomas* (2012) 53 Cal.4th 771, 814-815 [“[a]n unintentional shooting resulting from the brandishing of a weapon can be murder if the jury concludes that the act was dangerous to human life and the defendant acted in conscious disregard of life”]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 109-110 [“where the defendant obtains a lethal weapon and then engages the victim in an argument, malice may be implied—from the circumstances leading to the killing—to support a conviction of

second degree murder”].) On this record, Ramirez’s conviction for second degree murder was supported by substantial evidence.

III. Failure to Properly Instruct the Jury on the Personal-use-of-a-firearm Enhancement

Ramirez asserts that the trial court erred in failing to instruct the jury on the elements of the personal-use-of-a-firearm enhancement under section 12022.53, subdivision (b). Although the trial court did instruct the jury on the enhancement with CALCRIM No. 3146, the version of the instruction given by the court only applied to manslaughter, and did not apply to murder. Ramirez argues that the failure to instruct on the elements of the enhancement as applied to the crime of murder constituted prejudicial error, and thus, requires reversal of the jury’s finding that she personally used a firearm in committing that crime.

A. Relevant Background

In charging Ramirez with the murder of Garcia, the prosecution alleged that, in the commission of that offense, Ramirez (1) personally used a firearm within the meaning of section 12022.53, subdivision (b), (2) personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and (3) personally and intentionally discharged a firearm causing death or great bodily injury within the meaning of section 12022.53, subdivision (d).

At trial, the jury was instructed on the elements of first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter. The jury also was instructed on the elements of the three firearm enhancement allegations with CALCRIM No. 3146 (defining the elements of the section 12022.53(b) enhancement), CALCRIM No. 3148 (defining the

elements of the 12022.53(c) enhancement), and CALCRIM No. 3149 (defining the elements of the section 12022.53(d) enhancement).³

As given by the trial court, CALCRIM No. 3146 provided as follows: “If you find the defendant guilty of the crimes of Voluntary or Involuntary Manslaughter, you must then decide whether the People have proved the additional allegation that the defendant personally used a firearm during the commission of that crime. [¶] A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion. [¶] Someone personally uses a firearm if he or she intentionally does any of the following: [¶] 1. Displays the firearm in a menacing manner; [¶] 2. Hits someone with the firearm; [¶] or [¶] 3. Fires the firearm. [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.” The trial court did not instruct the jury, either orally or in writing, on the elements of the section 12022.53(b) enhancement as applied to the crime of first or second degree murder.⁴

³ Although the written instructions provided to the jury included a copy of CALCRIM No. 3148 (defining the elements of the section 12022.53(c) enhancement), the trial court did not read that instruction to the jury.

⁴ The version of CALCRIM No. 3149 (defining the elements of the section 12022.53(d) enhancement) given by the trial court did state that it applied to the “crime of First or Second Degree Murder.” The written version of CALCRIM No. 3148 (defining the elements of the section 12022.53(c) enhancement) provided to

The verdict forms given to the jury for the crimes of first and second degree murder included each of the three firearm enhancement allegations. Those verdict forms asked the jury whether “in the commission of the above offense, the defendant, Janet Ivonne Ramirez” (1) “personally and intentionally discharged a firearm, a handgun, which caused great bodily injury or death to [Garcia], within the meaning of Penal Code Section 12022.53(d)”; (2) “personally and intentionally discharged a firearm, a handgun, within the meaning of Penal Code Section 12022.53(c)”; and (3) “personally used a firearm, a handgun, within the meaning of Penal Code Section 12022.53(b).” For each firearm enhancement, the jury was asked to find whether the allegation was “True” or “Not True.”

On the second day of deliberations, the jury submitted two notes to the trial court. The first note, which was submitted at 2:54 p.m., stated: “On verdict form—regarding the gun allegation we are unsure which CALCRIM definitions to use for the three different ‘True or Not True’ questions—and therefore not sure we should ‘fill in each blank.’ The Penal Code numbers seem to point us to lesser charge forms.” In response to this inquiry, the trial court advised the jury in writing: “If you find the first allegation (personal discharge causing death) you need not proceed to the second or third allegation. If the first is ‘not true’ by unanimous vote, go to the second listed allegation etc.” The jury’s second note, which was submitted at 3:13 p.m., stated: “We do not have the definition for Penal Code 12022.53(c) and only the manslaughter version for 12022.53(b). What is attached

the jury similarly stated that it applied to the “crime charged in Count 1, Murder.”

is all we have.” There is no indication in the record that the trial court responded to this second inquiry. Instead, at 3:27 p.m., the jury informed the court that it had reached a verdict.

In its verdict finding Ramirez guilty of second degree murder, the jury found the section 12022.53(d) and 12022.53(c) firearm enhancements to be “not true,” and found the section 12022.53(b) firearm enhancement to be “true.” Ramirez was sentenced to a term of 10 years for the section 12022.53(b) enhancement, in addition to the term of 15 years to life for the second-degree murder conviction.

B. Governing Legal Principles

“It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” [Citations].” (*People v. Diaz* (2015) 60 Cal.4th 1176, 1189.) The trial court therefore has a sua sponte duty to instruct the jury on the essential elements of each charged offense. (*People v. Merritt* (2017) 2 Cal.5th 819, 824.) The court also has a duty to instruct the jury on the elements of a sentence enhancement allegation. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326).

“An instructional error that improperly describes or omits an element of the crime from the jury’s consideration is subject to the ‘harmless error’ standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18, 24” [*Chapman*], which requires reversal unless it “appears beyond a reasonable doubt that the instructional error did not contribute to the jury’s verdict.” (*People v. Lamas* (2007) 42 Cal.4th 516, 526; accord *People v.*

Merritt, supra, 2 Cal.5th at p. 829.) Likewise, “a trial court’s failure to instruct the jury on an element of a sentence enhancement provision (other than one based on a prior conviction), is federal constitutional error if the provision ‘increases the penalty for [the underlying] crime beyond the prescribed statutory maximum.’ [Citation.] Such error is reversible under *Chapman* . . . , unless it can be shown ‘beyond a reasonable doubt’ that the error did not contribute to the jury’s verdict.” (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 326.)

**C. The Trial Court Prejudicially Erred in
Instructing the Jury on the Elements of the
Personal-use-of-a-firearm Enhancement**

Ramirez contends that the jury’s finding that she personally used a firearm in committing the crime of murder within the meaning of section 12022.53, subdivision (b) must be reversed because the trial court failed to instruct the jury on the elements of that enhancement. Ramirez reasons that the version of CALCRIM No. 3146 given by the court was not sufficient to instruct the jury on how to apply the enhancement to the crime of murder because the instruction specified that it only applied to the crimes of voluntary or involuntary manslaughter, which are not offenses subject to section 12022.53. The Attorney General, on the other hand, claims that the version of CALCRIM No. 3146 given by the trial court correctly defined the elements of the section 12022.53(b) enhancement even if it omitted the crime of murder, and that the jury must have applied the instruction to the crime of murder in finding the enhancement to be true.

We conclude that the trial court failed to properly instruct the jury on the elements of the section 12022.53(b) enhancement. To prove the enhancement, the prosecution had to establish that

Ramirez (1) personally used a firearm (2) in the commission of a statutorily-enumerated felony offense. (§ 12022.53, subd. (b).) This second element—in the commission of an enumerated felony—was erroneously described by the trial court in its instruction to the jury. As discussed, the version of CALCRIM No. 3146 given by the court stated that “[i]f you find the defendant guilty of the crimes of Voluntary or Involuntary Manslaughter, you must then decide whether the People have proved the additional allegation that the defendant personally used a firearm during the commission of that crime.” However, the crimes of voluntary and involuntary manslaughter are not among the felony offenses to which section 12022.53 applies. (See § 12022.53, subd. (a) [manslaughter not listed as one of the 18 felonies subject to an enhancement under the statute]; *People v. Villanueva* (2011) 196 Cal.App.4th 411, 417, fn. 6 [“section 12022.53 applies to murder and attempted murder, but not manslaughter or attempted manslaughter”].) While the crime of murder is one of section 12022.53’s enumerated felonies, that crime was not identified as the applicable underlying offense in the version of CALCRIM No. 3146 given to by the court, nor was the jury provided with any other instruction that defined the section 12022.53(b) enhancement. The jury therefore was not properly instructed on how to determine the truth of the section 12022.53(b) enhancement allegation if it found Ramirez guilty of murder. The omission of the crime of murder from the version of CALCRIM No. 3146 given by the trial court was error.

Based on the totality of the record before us, we further conclude that the error in instructing the jury on elements of the section 12022.53(b) enhancement cannot be deemed harmless

beyond a reasonable doubt.⁵ The record shows that, during its deliberations, the jury realized that it had not been instructed on the section 12022.53(b) enhancement as applied to the crime of murder, and that it twice sought guidance from the trial court regarding this error. In its first note, the jury advised the court that the Penal Code sections identified in the instructions for the firearm enhancements “seem to point us to the lesser charge forms.” When the court responded to this inquiry by simply telling the jury the order in which to answer the three enhancement allegations, the jury sent the court a second note explicitly stating that it had “only the manslaughter version for 12022.53(b).” The court never responded to this second inquiry. The jury’s two notes make clear that it was seeking a definition of personal use of a firearm as applied to the crime of murder, and that it did not know if it could use the definition in CALCRIM No. 3146 given that the instruction, by its terms, only applied to the lesser included offense of manslaughter. The trial court,

⁵ Citing *People v. Cummings* (1993) 4 Cal.4th 1233 (*Cummings*), Ramirez argues that the error is reversible per se because the jurors were not instructed on any elements of the section 12022.53(b) enhancement. This argument lacks merit. In *People v. Merritt, supra*, 2 Cal.5th 819, the California Supreme Court reconsidered the reversible-per-se standard set forth in *Cummings* for a failure to instruct the jury on any elements of a charged crime. The *Merritt* court concluded that “the rule of *Cummings* [citation] has no continuing validity” (*id.* at p. 831), and that the *Chapman* harmless error standard applies “so long as the error does not vitiate *all* of the jury’s findings” (*id.* at p. 829). Because the instructional error in this case clearly did not vitiate all of the jury’s findings, we apply the *Chapman* standard and consider whether the error was harmless beyond a reasonable doubt.

however, repeatedly failed to provide an adequate response to this inquiry, thus leaving the jury without clear guidance on what definition it should use.

The Attorney General asserts that the jury must have applied the definition set forth in CALCRIM No. 3146 in finding that Ramirez personally used a firearm in the commission of a murder because that was the only instruction regarding personal firearm use that was provided by the trial court. But given that the jury specifically advised the court that it was “unsure which CALCRIM definitions to use” for the firearm enhancements and did not thereafter receive a clarifying instruction on that issue, we cannot presume that the jury decided to apply CALCRIM No. 3146’s definition of personal firearm use rather than come up with its own non-legal definition of the term. A jury not properly instructed on elements of the section 12022.53(b) enhancement might have concluded that Ramirez personally used a firearm when, as she recounted to the police, she placed a gun case on the bed during an argument with a drunken Garcia and then struggled to gain control of the weapon after he grabbed it from the case. However, standing alone, such conduct by Ramirez would not meet the legal definition of personal use of a firearm under the statute. That conclusion would not necessarily be inconsistent with Ramirez’s conviction for second degree murder; implied malice sufficient to support a conviction for second degree murder may be found “where the defendant obtains a lethal weapon and then engages the victim in an argument” leading to a killing. (*People v. Nieto Benitez, supra*, 4 Cal.4th 91, 109-110.) Therefore, while it is possible that the jury pieced together a correct understanding of the elements of the section 12022.53(b)

enhancement from the instructions given, it is not clear beyond a reasonable doubt that it did so.

Moreover, as our Supreme Court has observed, an instructional error involving the omission of one or more elements of a charged offense “will be deemed harmless only in unusual circumstances, such as where each element was undisputed, the defense was not prevented from contesting any of the omitted elements, and overwhelming evidence supports the omitted element.” (*People v. Mil* (2012) 53 Cal.4th 400, 414.) Such unusual circumstances are not present here. This is not a case where each element of the section 12022.53(b) enhancement was uncontested or supported by overwhelming evidence. There were no eyewitnesses to the shooting death of Garcia, and no other direct evidence establishing that Ramirez personally used a firearm in the shooting within the meaning of section 12022.53, subdivision (b). While Ramirez gave the police different accounts of how the shooting occurred, she never made any statement in which she admitted that she intentionally fired the gun or displayed the gun in a menacing manner. Instead, she told the police that the gun discharged accidentally after Garcia grabbed it from the case and Ramirez attempted to take it away from him.

As previously discussed, the jury reasonably could have inferred from the totality of the evidence that Ramirez either intentionally shot Garcia as soon as he entered the bedroom, or unintentionally shot him in a struggle for the gun after she had threatened him with it. However, in assessing the prejudice caused by the error in instructing the jury on the elements of the section 12022.53(b) enhancement, the pertinent question is not whether a rational jury could have inferred that Ramirez personally used a firearm in committing the crime of murder

but “whether the prosecution has ‘prove[d] beyond a reasonable doubt that the error . . . did not contribute’ to the jury’s verdict.” (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 320.) On this record, we cannot conclude that the evidence supporting the enhancement was so overwhelming as to render the instructional error harmless beyond a reasonable doubt. Accordingly, the jury’s true finding on the section 12022.53(b) enhancement allegation and the corresponding 10-year term imposed on that enhancement must be vacated.⁶

DISPOSITION

The true finding on the personal-use-of-a-firearm enhancement allegation pursuant to section 12022.53, subdivision (b) is reversed, and the 10-year term imposed on that enhancement are vacated. The judgment is otherwise affirmed. Should the People wish to conduct a new trial on the section 12022.53 (b) enhancement, within 60 days of the remittitur, they

⁶ In light of our conclusion that the section 12022.53(b) enhancement must be reversed, we need not address Ramirez’s alternative argument that her sentence should be vacated and the case remanded to the trial court so that it may consider whether to strike the enhancement pursuant to the newly-enacted section 12022.53, subdivision (h). (See § 12022.53, subd. (h) [“The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.”].) Should the People wish to conduct a new trial on the section 12022.53 subdivision (b) enhancement, within 60 days of the remittitur, they may file a written demand for a new trial. If a demand is made, a new trial may be held on the enhancement allegation; if no demand is made, Ramirez shall be resentenced on the conviction.

may file a written demand for a new trial. If a demand is made, a new trial may be held on the enhancement allegation; if no demand is made, Ramirez shall be resentenced on the conviction.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.